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No. 88-328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Petitioner,

v.

JAMES R. RICHARDS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

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The Government's Memorandum for the Respondents in Opposition ("Opp.") is not, strictly speaking, a response at all. The Government simply ignores the points raised by the Territorial Court in its Petition, not even attempting to explain why the Territorial Court's statutory readings might be wrong, why the legislative history it cites might not be probative, how the cases on which it relies might be distinguishable, or why the logical arguments might not make sense. The Government simply recites the holdings below and dismisses the Petition as not raising an important question. Even the District Court below, however, recognized that the case pre-

sented a significant question of "first impression" concerning "the constitutional assignment of power" and that it was important that "the relationship of the respective levels of government [be] clearly defined." Pet. App. 42a-43a. The conclusion is inescapable that the Government avoids answering the Territorial Court's arguments for the simple reason that it has no good answers.

1. In its Petition, the Territorial Court explained why Section 17 of the Revised Organic Act, which authorizes the Department of the Interior to audit "the government of the Virgin Islands," 48 U.S.C. § 1599, does not confer on Interior any authority to audit the *judicial branch* of the Virgin Islands. The Territorial Court noted:

- Section 17 appears in the "executive branch" subchapter of the Act, not in the "judicial branch" or even the "fiscal provisions" subchapters. Pet. 7-8.
- In the legislative history of the Act, Congress used the words "Virgin Islands government" to refer to the executive branch. Pet. 10.
- Court decisions in the immediate wake of the Act concluded that the phrase "government of the Virgin Islands" referred to the political branches. Pet. 10 & n.11.

The Government presents no response to these points. On the question of construing Section 17, the Government does not even acknowledge petitioner's catalogue of regulations (including Department of Justice regulations), statutes, and judicial decisions construing "government" as not including the judiciary, Pet. 8-10 & nn.7-10, but simply cites an irrelevant decision construing "United States" as not limited to the executive. Opp. 5.

2. The Territorial Court explained in its Petition that Section 30 of the Act excepted from the jurisdiction of Interior matters relating to "the judicial branch," 48 U.S.C. § 1544, consistent with the foregoing construction

of Section 17. The Territorial Court also detailed why this deliberate exception—based on Congress's separation of powers concerns—was not restricted to the District Court of the Virgin Islands but also embraced the Territorial Court.[1] The Territorial Court noted:

- The literal language of Section 30 is descriptive rather than limiting, evincing an intent to except from Interior *all* matters relating to the judicial branch. Pet. 13.

- The legislative history specifies that "Section 30 provides generally that matters pertaining to the government of the Virgin Islands, *except for the judiciary*, shall be placed under the jurisdiction of the Secretary of the Interior," H.R. Conf. Rep. No. 2105, 83d Cong., 2d Sess. 22 (1954) (emphasis supplied), and the same Act provides that the Virgin Islands judiciary includes the District Court *and* local courts such as the Territorial Court. 48 U.S.C. § 1611(a).

- The reading of the court below—that only matters vested in the Administrative Office as of July 22, 1954 were excepted—would "freeze" the allocation of authority between the AO and Interior as of that date, a clearly unintended result. Pet. 13-14.

- Applying the same construction to the parallel provision of Section 30—concerning the U.S. Attorney and U.S. Marshal—would place all duties of those officials added after July 22, 1954 under the Secretary of the Interior rather than the Attorney General, again a clearly unintended result (and one the

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[1] The Government quotes the court below to the effect that there was no "'valid reason'" why Congress would exclude the Virgin Islands judiciary from the scope of Interior's audit authority. Opp. 4 (quoting Pet. App. 6a). Congress, however, had reason enough to create the express exception in Section 30, to preclude intrusions on the judiciary of the sort at issue here. *See* Pet. 11, 17-20.

Solicitor General understandably does not accept). Pet. 14.

- The decision below leads to the absurd result that the District Court and the Territorial Court—component parts of the one judicial branch of the Virgin Islands, with overlapping jurisdiction, personnel, funding, and bar, will be audited by vastly different entities (AO and Interior) in different branches of the Federal Government. Pet. 14-16.

Again, the Government ignores each of these points, offering no response to any of them.

3. On the constitutional issue, the Government invokes the asserted "plenary power" of Congress under Article IV, failing to address Congress's own unambiguous decision to apply the separation of powers to the Virgin Islands. *See* Pet. 21-22. The Government also argues that separation of powers concerns do not apply because the Territorial Court (like the District Court of the Virgin Islands) is not an Article III court, even though separation of powers principles have been applied to non-Article III tribunals, *see* Pet. 20 n.25, and the Government cites no case holding that they should not be fully applicable in such situations.

The Territorial Court explained that the decision below —holding that the separation of powers applied in the Virgin Islands, but *not* if invoked against the Federal Government—was a departure from the test for applying constitutional protections to the territories established in the *Insular Cases*.[2] Pet. 20-24. Noting that the court below cited no ruling from any court in support of its new approach, petitioners issued an unambiguous challenge to the Government, stating that "[c]ounsel is aware of no case—until the decision below—ruling that a constitutional protection *has* followed the Flag, but *not* if

[2] *Downes* v. *Bidwell*, 182 U.S. 244 (1901); *Armstrong* v. *United States*, 182 U.S. 243 (1901); *Dooley* v. *United States*, 182 U.S. 222 (1901); *De Lima* v. *Bidwell*, 182 U.S. 1 (1901).

the protection is invoked against the Federal Government." Pet. 23 (emphasis in original). The Government could not respond with a single case for the same reason the court below could cite no precedent—its decision is, quite literally, unprecedented.

This Court in *Springer* v. *Government of the Philippine Islands*, 277 U.S. 189 (1928), applied the separation of powers to a territory, without any suggestion that it was applying a new species of the doctrine, one that would offer no protection in the face of intrusions from other branches of the Federal Government. The underlying concern of the separation of powers is implicated by executive intrusions on the judiciary regardless of whether those intrusions originate with the territorial executive or—as here—with Interior.

In addition, Congress itself has spoken to the question of whether constitutional protections—if applicable in the Virgin Islands—should apply differently there than they do stateside. In Section 3 of the Revised Organic Act, Congress extended certain provisions of the Constitution to the Virgin Islands and specified that they "shall have the same force and effect there as in the United States or in any State of the United States." 48 U.S.C. § 1561. This guiding principle is applicable to the separation of powers.[3]

4. Perhaps most disturbing about the Government's ostrich-like approach to the Petition is the assertion that the decision below raises no "question of general impor-

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[3] The separation of powers was not enumerated in Section 3 because it is not expressly enumerated in the Constitution itself. Congress clearly applied the principle to the Virgin Islands, however, *see* Pet. 21-22, and indeed even the court below "assum[ed]" that the doctrine applied "as among the branches of the territorial government." Pet. App. 8a. As Section 3 indicates, however, and as the approach of the *Insular Cases* mandates, if the doctrine applies it applies with the "same force and effect" in the Virgin Islands as on the mainland.

tance." Opp. 5.[4] While stating this, the Government offers no response to the statement in the Petition that the question presented is of broader significance, because of its direct relevance to the stature and independence of other territorial courts from Guam to Puerto Rico. Pet. 6. Nor does the Government explain how an unprecedented departure from the historic approach of the *Insular Cases* can be insignificant, nor how a case that directly implicates Canon 1 of the Code of Judicial Conduct—obligating judges to help ensure judicial independence—can be so cavalierly dismissed. Pet. 6.

As outlined in the Petition, Pet. 6-7, the question presented is of vital significance, and ignoring it will not make it less so. In addition, the case is important to the Territorial Court, the judges who sit on that bench, and those who appear before them seeking justice. The Justices of this Court can readily recognize that it is not pleasant for jurists to become litigants, and that a decision to do so would be undertaken only under the most serious circumstances. The Territorial Court concluded that Interior's assertion of authority to probe the court's internal workings was a direct threat to "the integrity and independence of the judiciary," Code of Judicial Conduct, Canon 1, and could not go unchallenged. This Court is protected against such executive branch intrusions by the AO—a judicial branch agency—and Congress clearly intended that the same protection extend to the Virgin Islands judiciary. This conclusion as a matter of statutory construction is compelled by the serious constitutional difficulties with the contrary interpretation adopted below.

The Government has now decided to dismiss the Territorial Court's positions without even seriously addressing them. This Court should not do the same.

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[4] The Government also states that there is no conflict in the circuits, Opp. 5, but of course there cannot be, since all Virgin Islands cases go to the Third Circuit.

CONCLUSION

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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